

SERVICE DATE - MAY 22, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34294

STATE OF VERMONT–ACQUISITION EXEMPTION– CERTAIN ASSETS OF
NEWPORT AND RICHFORD RAILROAD COMPANY, NORTHERN VERMONT
RAILROAD COMPANY INCORPORATED AND CANADIAN AMERICAN
RAILROAD COMPANY

Decided: May 15, 2003

On December 19, 2002, the State of Vermont (Vermont)¹ filed a verified notice of exemption under 49 CFR 1150.41 to acquire from the Estates of Newport and Richford Railroad Company, Northern Vermont Railroad Company Incorporated, and Canadian American Railroad Company (collectively, the Sellers),² the Sellers' rights, title and ownership interest in the right-of-way, trackage, and other physical assets of a 61.58-mile rail line, extending between milepost 63.58 in Newbury (Wells River) and milepost 2.0 in Newport, in Orange, Caledonia and Orleans Counties, VT (the Subject Line).³ The transaction was scheduled to become effective on December 26, 2002, but not before Montreal, Maine & Atlantic Railway, Ltd. had consummated its acquisition of certain other rail assets belonging to the BAR rail system in Vermont and Maine.⁴ At the same time that Vermont filed its verified notice of exemption in the instant

¹ Vermont, acting through its Agency of Transportation, has the authority under state law to acquire railroad assets to ensure the continuity of freight rail service by third parties over such properties.

² The Sellers are railroads in the Bangor and Aroostook Railroad Company (BAR) rail system. On August 15, 2001, an involuntary petition for bankruptcy under Chapter 11 of the Bankruptcy Act was filed against BAR before the United States Bankruptcy Court for the District of Maine (Court). On May 14, 2002, the Sellers filed voluntary petitions for relief under Chapter 11 before the Court.

³ The Notice was served and published in the Federal Register on January 17, 2003 (68 FR 2633).

⁴ In Montreal, Maine & Atlantic Railway LLC-Acquisition and Operation Exemption–Bangor & Aroostook Railroad Company, Canadian American Railroad Company,
(continued...)

proceeding, it also filed a motion to dismiss that notice. In its motion, Vermont asserted that the transaction should not be subject to Board jurisdiction because Vermont will not become a common carrier as a result of the transaction. There is no opposition to the motion. We will grant the motion to dismiss.

BACKGROUND

Vermont states that it entered into a purchase and sale agreement (purchase agreement) with the Sellers to acquire the Sellers' right, title and ownership interest in the right-of-way, trackage, and other physical assets on the Subject Line. The purchase agreement provides that the Sellers will retain an exclusive freight operating easement (freight easement) on the Subject Line to provide continued common carrier freight service. Pursuant to the provisions of the freight easement, the Sellers will convey the retained common carrier obligation and right to provide service to the Washington County Railroad Company (WCRC).⁵ Vermont will not acquire any right or ability under the agreements to conduct or provide freight service on the Subject Line.

Vermont also states that it entered into an operating agreement with WCRC. The operating agreement provides that WCRC will have the exclusive right to continue to provide common carrier freight operations on the Subject Line. WCRC will be responsible for maintenance, dispatching, and constructing capital improvements as necessary for its rail service. Vermont will have no contractual rights to interfere with WCRC's operations as long as WCRC continues to meet its rail common carrier obligations.

⁴(...continued)

the Northern Vermont Railroad Company Incorporated, Newport & Richford Railroad Company and Van Buren Bridge Company, STB Finance Docket No. 34110 (STB served Sept. 19, 2002), Montreal, Maine & Atlantic Railway LLC (MM&A-LLC) was authorized to acquire and operate, among other things, some 518 miles of BAR's rail lines and other assets in Maine and Vermont. These assets do not include the Subject Line. In a subsequent decision served on December 18, 2002, the Board granted a motion to substitute Montreal, Maine & Atlantic Railway, Ltd. as the party that may acquire and operate these assets in lieu of MM&A- LLC.

⁵ See Washington County Railroad Company–Acquisition and Operation Exemption–Certain Rights of Newport and Richford Railroad Company, Northern Vermont Railroad Company Incorporated and Canadian American Railroad Company, STB Finance Docket No. 34302 (STB served Jan. 17, 2003).

According to Vermont, the various agreements⁶ clearly demonstrate that it will not hold itself out to provide common carrier rail service and that the transaction does not require Board authorization. In support, Vermont cites the following cases: Los Angeles County Transportation Commission–Petition for Exemption–Acquisition from Union Pacific Railroad Company, STB Finance Docket No. 32374 (STB served July 23, 1996); State of Vermont and Vermont Railway, Inc.–Acquisition and Operation in Vermont, 320 I.C.C. 330 (1963), as modified at 320 I.C.C. 609 (1964); South Orient Railroad Company, Ltd.–Acquisition and Operation Exemption–Line of the Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 31971 (ICC served Sept. 2, 1992); City of Oshkosh, WI and Wisconsin Central Ltd.–Petition for Declaratory Order, Finance Docket No. 32452 (ICC served June 8, 1994); Chicago Terminal Corporation–Acquisition of Leasehold Exemption–Elgin Joliet & Eastern Railway Company, Finance Docket No. 32495 (ICC served January 12, 1995); State of Georgia, Department of Transportation–Acquisition Exemption–Line of Central of Georgia Railway Company, STB Finance Docket No 33690 (STB served June 23, 1999); and Maine, DOT–Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine).

DISCUSSION AND CONCLUSIONS

The question here is whether our regulatory approval is required for Vermont to acquire the rail assets of the Subject Line. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901, if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Our authorization is not required, however, when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred. See State of Maine, 8 I.C.C.2d at 836-37.

The record shows that the Sellers are not transferring common carrier rights or obligations to Vermont, and that Vermont will not hold itself out as a common carrier performing rail freight service. Rather, WCRC will have all of the common carrier rights and obligations. Because Vermont will acquire only the physical rail assets on the Subject Line, Vermont will not become a rail carrier subject to our jurisdiction as a result of the transaction. Under these circumstances, this transaction does not require Board action, and we will not exercise jurisdiction over it. We will dismiss Vermont’s notice of exemption and discontinue this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

⁶ Copies of the purchase and sale agreement, freight easement, and operating agreement were attached as Exhibits A, B, and C respectively, to Vermont’s motion.

It is ordered:

1. Vermont's motion to dismiss the verified notice of exemption in this proceeding is granted.
2. The proceeding is discontinued.
3. This decision is effective on its date of service.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary